



STATE OF NEW JERSEY

In the Matter of Mark DiPasquale
 Southern State Correctional Facility,
 Department of Corrections

FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

CSC DKT. NO. 2018-1839
 OAL DKT. NO. CSR 00903-18

ISSUED: JULY 20, 2018 BW

The appeal of Mark DiPasquale, Senior Correction Officer, Southern State Correctional Facility, Department of Corrections, removal effective December 21, 2017, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on June 8, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Mark DiPasquale.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018



Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 00903-18

AGENCY DKT. NO. N/A

2018-1839

**IN THE MATTER OF MARK DIPASQUALE,
SOUTHERN STATE CORRECTIONAL
FACILITY.**

Sean Sprich, PBA Local #105, for appellant, Mark DiPasquale, pursuant to
N.J.A.C. 1:1-5.4(a)(6)

Jessica M. Saxon, Deputy Attorney General, for respondent, Southern State
Correctional Facility (Gurbir S. Grewal, Attorney General of New Jersey,
attorney)

Record Closed: May 11, 2018

Decided: June 8, 2018

BEFORE JOHN S. KENNEDY, ALJ:

STATEMENT OF THE CASE

Appellant, Mark DiPasquale, a Corrections Officer at Southern State Correctional Facility (respondent) appeals his removal, effective December 21, 2017, after testing positive for tetrahydrocannabinol (THC) following a random drug urine screening on August 24, 2017. Appellant was charged with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12, Other sufficient cause; Human Resources Bulletin (HRB) 84-17, C-11, Conduct unbecoming a public

employee; HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17, D7, Violation of administrative procedures and/or regulations involving safety and security; and HRB 84-17, E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. The appellant denies the allegations and states he was unaware he had ingested THC.

PROCEDURAL HISTORY

On October 25, 2017, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against the appellant. (J-1.) A departmental hearing was conducted on November 22, 2017. On December 21, 2017, the respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and removing appellant from employment, effective December 21, 2017. (J-2.) Appellant filed an appeal directly with the Office of Administrative Law (OAL) challenging his removal. The appeal was filed and perfected at the OAL on January 16, 2018. The hearing was held on May 3, 2018. The record remained open to allow the parties to submit redacted exhibits and the record closed on May 11, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

The parties made the following Joint Factual Stipulations and I therefore **FIND** the following as **FACT**:

1. Chain of custody is intact, complete and legally acceptable from the time the urine sample was taken from Mr. DiPasquale until the time it was tested at the State Toxicology Laboratory.
2. Mr. DiPasquale acknowledged receipt and signed for HRB 99-01, HRB 84-17, and the New Jersey Department of Corrections (NJDOC) Law Enforcement Personnel Rules and Regulations based on his new hire checklist.

Testimony

Duane Grade testified on behalf of the respondent. He has been employed by the NJDOC for twenty-two years and has been the Chief Investigator of the Special Investigations Unit (SIU) since July 2017. As Chief Investigator, he oversees the criminal and administrative investigations for the NJDOC. He is familiar with the drug screening process and he has undergone several random drug screenings throughout his career. There is a zero-tolerance policy for drug use in the NJDOC and all sworn law enforcement personnel are subject to random drug testing. The first workday of every month the SIU receives from Office of Information Technology (OIT) a computer printout list of those random individuals selected by a computer algorithm to be drug tested. All union representatives are made aware of the random urine selection process. Appellant was on the Master List for Donor Notifications for the period August 1, 2017, to August 31, 2017. (R-1.)

Law Enforcement Personnel Rules and Regulations, Article IV, Section 1 states:

No officer shall

- a) Report to duty under the influence of alcohol.
- b) Use, possess or sell any illegal drug or controlled dangerous substance, whether on or off duty,
- c) Frequent any business, private house or establishment where illegal drugs or controlled dangerous substances may be used, purchased or sold with the exception of any appropriate medical establishment for the purpose of receiving appropriate medical care. (J-5, at 9-10.)

Section 2 provides that an officer shall report the use, possession, or sale of any illegal drug or controlled dangerous substance by another officer, whether on or off duty. The report shall be made as soon as possible to the Institutional Administrator or his/her designee. (J-5, at 9.)

All new employees acknowledge that they receive the various policies. Appellant acknowledged that he received the Rules and Regulations when he was hired. (J-7.)

The NJDOC HRB 99-01, Amended November 6, 2009, sets forth the Drug Testing Policy. (J-3.)

Section IV, paragraph 3 provides that "Prior to the submission of a urine specimen, all individuals shall complete a medical questionnaire which clearly describes all medications, both prescription and over the counter (non-prescription), ingested in the past thirty days. (J-3, at 5.)

Section VIII entitled "Consequences of a Positive Result"

- A. Any covered person who tests positive for illegal drug use shall be:
 - 1. Suspended immediately from all duties and subjected to Loudermill and Departmental disciplinary procedures;
 - 2. Processed for termination from service;
 - 3. Reported by Internal Affairs to the Central Drug Registry maintained by the Division of State Police, and
 - 4. Barred permanently from future law enforcement in New Jersey. (J-3, at 8.)

Chief Grade is familiar with HRB 84-17 as amended and the Table of Offenses and Penalties. (J-4.) C.11, Conduct unbecoming an employee, the first offense is a minimum of a three-day suspension to removal. C.30, Use, possession or sale of any controlled dangerous substance (custody), the first offense is removal. E.1, General Violation of a rule, regulation, policy, procedure, order or administrative decision, the first offense warrants anywhere from an official written reprimand to removal. Appellant acknowledged receipt of this policy. Chief Grade is familiar with appellant's work/disciplinary history (J-6) which was moved into evidence for purposes of progressive discipline only.

Dennis Gunn testified on behalf of the respondent. He is a twenty-year employee of the NJDOC and is currently employed as a Principal Investigator at Southern State. His responsibilities as an investigations officer is to conduct all administrative and criminal investigations for the department in the field unit that he is assigned. They maintain all the evidence at the facility and investigate all crimes that occur in the facility and monitor the staff drug testing. He has monitored hundreds if not a thousand of drug tests. When first hired as an investigator, they receive the policy as

to how the drug testing should be administered and then are assigned to a senior investigator to conduct the drug testing until they are ready to administer it on their own. He himself has undergone several random drug tests in the course of his career.

The first working day of the month, the central office draws a list of random names and social security numbers of those officers to be tested that month. The central office notifies the investigator who then goes to central office to pick up the list and then goes to the facility with the list of those to be drug tested. Appellant's name was on the Master List for Donor Notifications for August 2017. (R-1.) Investigator Gunn called the shift commander to have appellant report to SID and when appellant reported, he was advised that he had been selected to provide a random urine sample for that month. Investigator Gunn monitored appellant's drug test. There is a drug testing booklet that is filled out with the individuals' name and social security number. (R-2.) There are monitor instructions that are checked off outlining the procedures to be followed. Attachment A-1 is the Drug Testing Employee Notice and Acknowledgement form signed by appellant and witnessed by Investigator Gunn, dated August 24, 2017. It provides as follows:

"I understand that if I produce a positive test result for illegal drug use, I will be dismissed from the New Jersey Department of Corrections and from my position as a "Covered Person".

"I understand that if I produce a positive test result for illegal drug use, that information will be forwarded to the Central Drug Registry maintained by the Division of State Police. Information from the registry can be made available by court order as part of a confidential investigation relating to law enforcement employment."

"I understand that if I produce a positive test result for illegal drug use, I will be permanently barred from serving as a law enforcement officer in New Jersey." (R-3.)

The Continuity of Evidence – Urine Specimen Form (R-5) summarizes the procedure for the drug testing. It indicates that a random drug screening occurred on August 24, 2017, of appellant that was ordered at 6:00 a.m. Appellant gave the urine sample at 7:12 a.m. on August 23, 2017. Investigator Gunn placed the specimen in the evidence refrigerator at 7:14 a.m.

Appellant provided two samples simultaneously at 7:12 a.m. The second sample was frozen in case of a positive result to allow the employee to have an independent test done on the urine. The second sample is maintained in their freezer until such time as they are notified the test was negative or the employee directs that the sample be released to another lab for testing as was done in this case. Appellant did not ask to have the second sample tested.

Investigator Gunn was notified of the results that there was a positive of one of the samples. The toxicology report for appellant's social security number came back positive for cannabinoids. (R-9.) Investigator Gunn prepared and signed an administrative investigation report summarizing this incident and consistent with his testimony. (R-11.)

Robert Javier testified on behalf of the respondent. Dr. Javier is the Acting Director of the State Toxicology Laboratory in Newark, New Jersey. He has been employed by the State for thirty-nine years as a forensic toxicologist. As the Acting Director, he sets the goals for the laboratory and specifies the methods for analysis, certifies data and finalizes reports for law enforcement drug testing. He has a Bachelor of Science Degree (B.S.) in Chemistry from Long Island University, an Master of Science (M.S.) from Adelphi University in Organic Chemistry and Biochemistry, and a Doctor of Philosophy (Ph.D.) from the State University of New York at Buffalo in Biochemistry with a Minor in Organic and Medicinal Chemistry. (R-12.) Forensic toxicology is an interdisciplinary field of science, that involves analytical chemistry, pharmacology and toxicology towards the analysis and interpretation of drugs in a legal setting. He has been conducting drug tests for thirty-nine years. There are two sections in the lab, the post-mortem section and law enforcement drug testing section. Seventeen thousand tests are done a year for law enforcement drug testing, approximately fourteen hundred a month just from the urine drug testing. Of those seventeen thousand tests, only about two percent or less are positive for drugs. He was qualified as an expert witness in approximately thirty cases. Dr. Javier was qualified as an expert witness in the field of drug testing and toxicology.

Dr. Havier is familiar with the NJDOC's drug testing policy. The state toxicology lab is the only lab authorized to conduct the drug testing for law enforcement drug testing. When he finalizes a report for a case, he reviews all the data submitted from the screening and confirmation testing as well as the certification from the medical review officer. A receptionist in the laboratory receives all drug testing specimens. In this case, Jean Smith, received the specimens and accepted each specimen for testing as indicated by her initials after each specimen and her name at the bottom of the submission form. (R-8.) The criteria she follows for accepting the sample is to check that the container has not been opened once it was sealed or tampered with in any way. She also checks the volume and appearance of the sample. The social security on the label inside of the container is checked and compared to the submission form and put into the computer which generates a toxicology number. The case is then referred to by the toxicology number. Appellant's sample was given Toxicology Number 17L012142.

After the samples are received and accepted for testing they are stored in the refrigerator and collected by an analyst from the law enforcement drug testing section and placed in a secured refrigerator in that unit. The sample will be subjected to a first screening procedure, an immunoassay procedure, using antibodies to identify drugs or classes of drugs that may be present in the sample. If the sample is screened positive, that is, it contains one or more of the drugs they are looking for, the original specimen will be tested by a confirmation method completely different from the screening method. The equipment used for the screening procedure is the Architect which is manufactured by Abbot Laboratories.

The drugs tested for are amphetamines, barbiturates, benzodiazepines, cocaine, creatinine for validity (to make sure the urine is human), methadone, opiates, oxycodone, phencyclidine (PCP) and tetrahydrocannabinol (THC) the major metabolite of tetrahydrocannabinol, the active ingredient in marijuana. The results of the immunoassay drug screening test in this matter were positive for cannabinoids. (R-9.) The creatinine level was dilute which indicates that the appellant had consumed a large amount of water. The test identifies whether a certain level of drug is present or not. Once a sample screens positive for a drug another aliquot of the original sample will be confirmation tested by a procedure called gas chromatography/mass spectrometry

(GCMS) which is the benchmark for the whole industry as far as confirming the identity and the amount of any particular drug. An aliquot is a small portion of the original sample for testing. An aliquot of the original sample is taken and is subjected to an extraction procedure to obtain a metabolite of marijuana, tetrahydrocannabinol. The criteria for identifying a particular compound includes the retention time, the weight of the fragments that it produces and the ratio of the fragments to one another. The GCMS drug confirmation report identified the drug as a metabolite of THC 11th carboxy THC and the amount of that metabolite was twenty-three nanograms per milliliter (ng/ml). (R-9.) This information was sent to the medical review officer to review whether anything listed on the medication sheet would account for this positive result. In this case, there was not.

Dr. Javier reviewed all the screening and confirmation data and the report from the medical review officer. (R-9.) He concluded all the testing was properly conducted and he generated a final report for this case. The medical review officer certification indicated that the screening results were positive for cannabinoids and the GCMS results were positive for 11 carboxy THC. All of the instruments that are used for the screening and confirmation testing are tested and checked in advance to make sure they are functioning properly and calibrated properly before the tests are run that day.

A sample is deemed to be positive if it contains more than fifteen (15.0) ng/ml of THC. The cutoff level of fifteen (15.0) ng/ml is used because that is the industry accepted level for the drug based on possible passive inhalation or casual exposure that cannot produce a reading over fifteen (15.0) ng/ml. The toxicology report for appellant's urine sample indicated carboxy levels of sixty-six (66.0) ng/ml. (R-9, p. 101.)

Dr. Javier's opinion concluded that the urine specimen contained the metabolite of THC at the level of sixty-six (66.0) ng/ml which is above the generally accepted cutoff value of fifteen (15.0) ng/ml.

Appellant testified on his own behalf. He was employed with the NJDOC at Southern State Prison from September 2008 until he was terminated in December 2017. He had been required to take four or five random drug cases during his

employment and has never tested positive in the past. He had no idea he was going to test positive in October 2017, and asserts that he does not do drugs. At some point prior to the October drug test, appellant alleges that he went to a party in Washington DC. He did not know at the time but there was food laced with marijuana (edibles) being served at the party. He never felt the effects of the drug. At some point after he was notified that he tested positive, but before his Departmental Hearing on November 22, 2017, appellant discovered, for the first time, from a friend that there were edibles at the party and presumes that he must have eaten one. He did not disclose this presumption at the Departmental Hearing and never disclosed it to anyone prior to his testimony at this hearing because he did not think it would matter and did not know that he needed to report it.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

Appellant was a Corrections Officer for nine years prior to his removal. He was familiar with the NJDOC drug testing protocol and has submitted to approximately four or five random drug screenings as a condition of his employment. Appellant asserts that he consumed an edible at a party prior to the drug test. He also asserts that he does not know what he ate that was laced with marijuana and only discovered that he consumed the edible after he received the PNDA. Appellant's testimony in this regard is not believable. He asserts that he discovered that he had consumed the edible prior to the Departmental Hearing and certainly before he received the FNDA yet he never

revealed this information to anyone prior to his testimony before this tribunal. Furthermore, his testimony derives from information he received from a friend. Out-of-court statements, if offered to prove the truth of the matters stated, are hearsay. While the rules of evidence applicable to proceedings in the judicial branch permit certain hearsay to be accepted as competent evidence under recognized exceptions to the general rule excluding hearsay, in administrative hearings the rule governing the admissibility of hearsay evidence is different. That rule is codified at N.J.A.C. 1:1-15.5:

(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5 (b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision,

which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. . . .

In light of the foregoing I **FIND** that no legally competent evidence has been presented to support the allegations contained in appellant's hearsay testimony. Therefore, I deem that appellant's testimony in this regard is not credible.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following as **FACTS**:

On August 24, 2017, appellant was randomly selected for a urine drug screening pursuant to the NJDOC drug testing policy set forth in HRB 99-01. The immunoassay drug screening test was positive for cannabinoids. A further confirmation drug test was performed using GCMS which indicated that 11 – Carboxy-THC was detected in the amount of sixty-six (66.0) ng/ml with a confirmation cutoff concentration of fifteen (15.0) ng/ml.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority bears the burden of establishing the truth of the allegations by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962) Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co, 124 N.J.L. 420, 423 (Sup. Ct 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling

Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93,104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained - of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins v. City of Atlantic City, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304. N.J. Super. 191, 199 (App. Div. 1997).

The NJDOC has a zero tolerance for drug use policy and requires that as a condition of employment officers submit to random urine drug testing. The NJDOC policy requires that a negative result is required to maintain employment and a positive

result will result in termination. Appellant failed his random drug test on August 24, 2017, by testing positive for the metabolite of THC. The NJDOC Rules and Regulations for Law Enforcement Personnel prohibit an officer from using any illegal drug or controlled dangerous substance, whether on or off duty. As a Corrections Officer, appellant represented law and order to the public and must present an image of personal integrity. Drug use among law enforcement personnel is certainly conduct that adversely affects the morale or efficiency of a governmental unit and has a tendency to destroy public respect in the delivery of governmental services. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing conduct unbecoming.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant tested positive for the THC metabolite following his random drug test on August 24, 2017. Law enforcement personnel are prohibited from using illegal drugs or controlled dangerous substances. Appellant's conduct violates the implicit standard of good behavior one would expect from a corrections officer. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

Appellant has also been charged with various offenses set forth in HRB 84-17, including C-11, Conduct unbecoming a public employee; HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance (custody); HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. As stated above, the same reasons for finding that the respondent has met its burden of proof for the conduct unbecoming violations set forth in N.J.A.C. 4A:2.3(a)6 apply to the C-11 conduct unbecoming charge. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17, C-11.

As far as the violation of HRB 84-17, C-30, Use, possession, or sale of any controlled dangerous substance, on August 24, 2017, appellant was subjected to a random drug test and tested positive for the THC metabolite. Therefore, I **CONCLUDE**

that appellant was in possession and used a controlled dangerous substance and respondent has met its burden of proof in establishing a violation of HRB 84-17, C-30.

Appellant has also been charged with a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision. On August 24, 2017, appellant submitted to a random drug screening as a condition of his continued employment with the NJDOC. Appellant tested positive for the metabolite of THC. Appellant's conduct is in violation of the Law Enforcement Personnel Rules and Regulations prohibiting an officer from possessing or using any illegal drug or dangerous substance whether on or off duty. Appellant's conduct is also in violation of the NJDOC's drug testing policy set forth in HRB 99-01, Amended November 6, 2009. Therefore, I **CONCLUDE** that respondent has met its burden of proof in establishing a violation of HRB 84-17 E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), *aff'd*, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly

proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

. . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Pursuant to the NJDOC HRB 99-01, Amended November 6, 2009, any covered person who tests positive for illegal drug use shall be suspended immediately from all duties and processed for termination from service. (J-3.) The NJDOC drug policy does not call for a range of discipline and removal is the only option for a violation of the drug testing policy. Appellant knew that as a condition of his continued employment he had to pass the random drug urine screens. Appellant acknowledged that he understood that if he produced a positive result for illegal drug use, he would be dismissed from his position with the NJDOC. Therefore, the only appropriate penalty in this case is removal. I **CONCLUDE** that the removal of the appellant was appropriate.

ORDER

Accordingly, I **ORDER** that the action of the respondent is **AFFIRMED**, as set forth above. Appellant's appeal is **DISMISSED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6/8/18
DATE

Date Received at Agency:

Date Mailed to Parties:



JOHN S. KENNEDY, ALJ

June 8, 2018

June 8, 2018

/dm

APPENDIX

WITNESSES

For Appellant:

Mark DiPasquale, appellant

For Respondent:

Duane Grade

Dennis Gunn

Robert Havier, Ph.D.,

EXHIBITS

Joint

- J-1 Preliminary Notice of Discipline, dated October 25, 2017
- J-2 Final Notice of Discipline (31-C), dated December 19, 2017
- J-3 HRB 99-01, Amended November 6, 2009, Subject: Drug Testing Policy
- J-4 HRB 84-17 Table of Offenses and Penalties
- J-5 Law Enforcement Personnel Rules and Regulations
- J-6 Disciplinary History of Appellant
- J-7 New Hire Checklist for Appellant

For Appellant:

None

For Respondent:

- R-1 Master List for Donor Notification
- R-2 Drug Screening Program Monitor booklet

- R-3 Drug Testing Employee Notice and Acknowledgement of appellant, dated August 24, 2017
- R-4 Drug Testing Medication Information
- R-5 Continuity of Evidence - Urine Specimen Form Attachment E2
- R-6 Continuity of Evidence - Urine Specimen Form Frozen Specimen Attachment EA2
- R-7 Frozen Specimen Receipt
- R-8 Lab LEDT chain of custody
- R-9 Toxicology Report/LEDT
- R-10 Random Urine Log
- R-11 Administrative Investigation Report of Bryan Gunn
- R-12 Curriculum Vitae of Robert Havier, Ph, D.
- R-13 LEDT Litigation Packet